

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. PROTEL ADVANTAGE, INC., d/b/a LONG DISTANCE SAVINGS, Respondent.	DOCKET NO. FCU-03-64
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued February 19, 2004)

Background

On December 2, 2003, Ms. Jamie Meyer, Executive Vice-President of River Valley Construction, filed an oral complaint with the Utilities Board (Board) that long distance telephone service for River Valley Construction had been changed to Protel Advantage, Inc., d/b/a Long Distance Savings (Long Distance Savings) without authorization. She stated she received a call October 7, 2003, from someone claiming to be from Qwest Communications, Inc. (Qwest), who told her the look of the bill was changing and she needed to okay the change. Ms. Meyer stated she agreed to the bill change, and that no rates were mentioned during the verification. She stated that two days later, Long Distance Savings switched River Valley Construction's long distance carrier. She further stated that the charges were billed

by USBI, that USBI agreed to re-rate the charges to Qwest's long distance rates, and that she had arranged to switch back to Qwest long distance.

Upon receiving the complaint, Board staff attempted to informally resolve the dispute. On December 2, 2003, Board staff forwarded the complaint to Long Distance Savings for response. Long Distance Savings responded by letter filed December 17, 2003, and stated company records show that on October 7, 2003, a sales agent of Long Distance Savings spoke with Ms. Meyer regarding changing telephone service to Long Distance Savings. Long Distance Savings stated Ms. Meyer indicated to the sales agent that she wished to make the switch, and a representative from Capitol Verification confirmed the decision. Long Distance Savings stated that during the verification call, Ms. Meyers confirmed she was authorized to make the switch and confirmed relevant account information. Long Distance Savings stated that the verification agent informed her of rates and charges, that the new long distance service provided by Long Distance Savings would start in five to ten days, and that Long Distance Savings was not affiliated with her local telephone company. Long Distance Savings attached a written statement from the verification company and a copy of the verification recording. Long Distance Savings stated that no evidence currently available to the company indicated that a misrepresentation took place as alleged. Long Distance Savings further stated it issued a full credit to River Valley Construction of \$82.39 plus tax on December 2, 2003, and \$61.25 plus tax on December 11, 2003.

On December 17, 2003, Board staff forwarded a copy of the verification recording and letter to Ms. Meyer and requested a response. On December 19, 2003, Ms. Meyer responded that her complaint was with regard to the conversation with the sales associate prior to the verification, who misrepresented himself as being with Qwest, and misrepresented that the reason for the call was to notify her of a change in the look of the bill and that he wanted to verify information to make the change. She stated there was no mention from the associate that she would be switching her long distance carrier and no mention of any rate changes. She agreed she was transferred to a verification company, but stated she knew there was never a mention of rates because that was her main concern with the conversation. She stated she questioned the sales associate to be sure there would be no change in rates and he assured her there would not be. She stated that if a recording of the conversation with the sales associate exists, she would like it submitted into evidence. She stated she received a credit of \$82.39. She also stated she had switched long distance service back to Qwest. She further stated her company signed up on the "Do Not Call" list and somehow this company slipped through it.¹

On December 22, 2003, Board staff issued a proposed resolution finding that because Ms. Meyer provided answers to the third party verifier in the affirmative, Long Distance Savings obtained authorization to change the long distance provider

¹ The "Do Not Call" registry was established by federal law and is enforced by the Federal Communications Commission. To report a complaint related to the "Do Not Call" registry, customers should contact the Federal Communications Commission by email at donotcall@fcc.gov or by telephone at 1-888-225-5322. Additional information is available on the FCC website at www.fcc.gov.

for River Valley Construction. Board staff stated it understood Ms. Meyer's complaint that the caller misrepresented himself, that she did not recall that rates were quoted, and that she suspected the recording may have been altered. Board staff found that the questions from the verifier were clear concerning switching the long distance provider to Long Distance Savings and did not find indication of tampering with the recording. Staff noted that Long Distance Savings provided a full refund of charges. The proposed resolution informed Ms. Meyer of the procedure if she disagreed with the proposed resolution. Ms. Meyer did not challenge the proposed resolution.

On December 31, 2003, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) petitioned the Board to commence an administrative proceeding to impose a civil penalty for a slamming violation. The Consumer Advocate stated the switch was made after a call from a telemarketer who misrepresented himself, and the response from Long Distance Savings did not include a recording of the telemarketing portion of the call, identify the telemarketer, or include a denial from the telemarketer.² The Consumer Advocate stated the proposed resolution is incorrect because neither the recording nor anything else in the record contains a basis for discrediting Ms. Meyer's allegations. The Consumer Advocate argued the misrepresentations were material, relied upon by Ms. Meyer, worked a fraud upon her, and therefore vitiated any authorization she might have

² On p. 3, paragraph 5, the Consumer Advocate stated "Subject to hearing rights to which Small Business America is entitled under law, the proposed resolution is incorrect." The undersigned administrative law judge believes this to be an error, and believes the Consumer Advocate meant "Long Distance Savings" not "Small Business America." If this is not correct, the Consumer Advocate must file a corrected petition stating what it meant.

given for the switch. The Consumer Advocate further argued that without a valid authorization, the change was an unlawful slam in violation of Iowa Code § 476.103 (2003). The Consumer Advocate further stated that Ms. Meyer denied the authenticity of the statement on the verification recording that she agreed to pay 19.9 cents per minute for domestic calls. It alleged that there are technologies that allow production of inauthentic recordings without apparent evidence of tampering, and since much lower long distance rates are available, Ms. Meyer's denial that she agreed to pay 19.9 cents per minute is highly credible. The Consumer Advocate argued that like allegations from other Iowa complainants enhance her credibility, and cited to two other informal complaint files. The Consumer Advocate argued a civil penalty should be imposed because a credit will not stop the fraudulent practices. The Consumer Advocate further argued the Board should consider any history of prior violations in determining the amount of the penalty. The Consumer Advocate stated that Long Distance Savings "may" be an affiliate of Twin City Capital d/b/a Small Business America (Small Business America) and there is a history of prior violation by Small Business America. The Consumer Advocate cited to two complaint files.

On January 27, 2004, the Board issued an order finding sufficient information to warrant further investigation, docketing the proceeding, and ordering Long Distance Savings to file a response to the Consumer Advocate's petition.

Late in the day on January 26, 2004, Long Distance Savings filed a reply to the petition. Board staff received the reply on the afternoon of January 27, 2004. In

its reply, Long Distance Savings denied the allegations in the informal complaint, stated it complied with all applicable statutes and rules, and denied that the proposed resolution was incorrect. Long Distance Savings stated it forwarded the information in the complaint to the marketing agency responsible for the sale. It stated it takes steps to ensure its marketers properly represent its products and services, including strict adherence to selling guidelines, random unannounced monitoring of calls, and third-party verification of new sales. Long Distance Savings asserted it would terminate its contract with marketing agencies not adhering to its strict standards, especially those involving misrepresentation. Long Distance Savings stated the verification service for this sale was Capitol Verification, and it does not compensate verification services based on successful outcome of the verification process. Long Distance Savings repeated what it stated are the facts regarding the account that it previously provided to Board staff in its December 17, 2003, response in the informal complaint. Long Distance Savings denied it had a history of prior violations and denied that it was an affiliate of Small Business America. Long Distance Savings requested that the Consumer Advocate's petition be denied in its entirety and that it be awarded costs and attorney fees incurred in defending the action. On February 5, 2004, Long Distance Savings filed a certificate of service in relation to its reply.

The reply was filed by Mr. Patrick D. Crocker, and the certificate of service was filed by Mr. Steven Brown, attorneys in Michigan. If an attorney is not licensed by the State of Iowa, permission to appear must be granted by the Board.

199 IAC 7.2(7)"e." A verified statement that contains the attorney's agreement to

submit to and comply with the Iowa Code of Professional Responsibility for Lawyers must be filed with the Board and the written appearance of a resident attorney must be provided for service pursuant to Iowa Admission to the Bar rule 31.14(2).

On February 16, 2004, the Board issued an order stating Long Distance Savings did not provide new information in its reply that altered the Board's initial determination there was sufficient information to warrant further investigation, and assigned the case to the undersigned administrative law judge.

Pursuant to Iowa Code §§ 476.3(1) and 476.103(4), and 199 IAC 6.5, a procedural schedule will be established and a hearing regarding this complaint will be held if needed.

The statutes and rules involved in this case include Iowa Code §§ 476.3 and 476.103 and Board rules at 199 IAC 1.8, 22.23, and Chapters 6 and 7. A link to the Board's administrative rules (in the Iowa Administrative Code (IAC)) is contained on the Board's website at www.state.ia.us/iub.

The issues

The issues in this case generally involve the change of River Valley Construction's long distance telephone service to Long Distance Savings, whether Long Distance Savings complied with state and federal law when it changed River Valley Construction's long distance service, whether imposition of a civil penalty is appropriate, and what should be done to resolve the case. Other issues may be raised by the parties prior to and during the hearing.

Prepared testimony and exhibits

All parties will have the opportunity to present and respond to evidence and make argument on all issues involved in this proceeding. Parties may choose to be represented by counsel at their own expense. Iowa Code § 17A.12(4). The proposed decision that will be issued in this case must be based on evidence contained in the record and on matters officially noticed. Iowa Code §§ 17A.12(6) and 17A.12(8).

The submission of prepared evidence prior to hearing helps identify disputed issues of fact to be addressed at the hearing. Prepared testimony contains all statements that a witness intends to give under oath at the hearing, set forth in question and answer form. When a witness who has submitted prepared testimony takes the stand, the witness does not ordinarily repeat the written testimony or give a substantial amount of new testimony. Instead, the witness is cross-examined concerning the statements already made in writing. The use of prepared testimony and submission of documentary evidence ahead of the hearing prevents surprise at the hearing and helps each party to prepare adequately so a full and true disclosure of the facts can be obtained. Iowa Code §§ 17A.14(1) and (3).

Party status and communication with the Board

The Consumer Advocate and Long Distance Savings are currently the parties to this proceeding. If River Valley Construction wishes to be a party to this case, it must notify the Board in writing in accordance with the procedural schedule established in this order.

Each party must file an appearance identifying one person upon whom the Board and the other parties may serve all orders, correspondence, or other documents. 199 IAC 7.2. The written appearance must substantially comply with 199 IAC 2.2(15). The appearance must include the docket number of this case as stated in the caption above. Appearances must be filed at the earliest practical time with the Executive Secretary, Utilities Board, 350 Maple Street, Des Moines, Iowa 50319. The appearance must be accompanied by a certificate of service that conforms to 199 IAC 2.2 and verifies that a copy of the document was served upon the other parties. As discussed above, out-of-state counsel must comply with the rules of the Board and the Iowa Supreme Court, and an appearance by a resident attorney must be provided.

Any party who communicates with the Board should send an original and ten copies of the communication to the Executive Secretary at the address above, accompanied by a certificate of service. One copy of the communication should also be sent at the same time to each of the other parties to this proceeding except that three copies must be served on the Consumer Advocate. 199 IAC 1.8(4)"c." These requirements apply, for example, to the filing of an appearance or to the filing of prepared testimony and exhibits with the Board.

Ex parte communication is prohibited as provided in Iowa Code § 17A.17. Parties or their representatives and presiding officers shall not communicate directly or indirectly in connection with any issue of fact or law in a contested case except

upon notice and an opportunity for all parties to participate. The undersigned administrative law judge is the presiding officer in this case.

Pursuant to 199 IAC 6.7, the written complaint and all supplemental information from the informal complaint proceedings, identified as Docket No. C-03-260, are part of the record of this formal complaint proceeding.

The materials that have been filed in this docket are available for inspection at the Board Records and Information Center, 350 Maple Street, Des Moines, Iowa 50319. Copies may be obtained by calling the Records and Information Center at (515) 281-5563. There will be a charge to cover the cost of the copying. Board orders are available on the Board's website at www.state.ia.us/iub.

All parties should examine Iowa Code §§ 476.3, 476.103, and Board rules at 199 IAC 1.8 and 22.23, and Chapters 6 and 7, for substantive and procedural rules that apply to this case.

Stipulation of Facts and Prehearing Brief

The facts underlying this case have already been the subject of an informal complaint proceeding. Therefore, it is appropriate that the parties file a stipulation of facts, so that only facts in dispute need be resolved in this formal complaint proceeding. In addition, it is appropriate that the parties file prehearing briefs that identify and discuss their respective positions. Finally, the parties must discuss whether it is possible to settle this case without further formal proceedings and the involvement of the undersigned administrative law judge.

IT IS THEREFORE ORDERED:

1. If the parties are unable to settle this case, on or before March 11, 2004, the parties must file a document stipulating to as many of the facts in this case as possible. The stipulation must also identify which facts remain in dispute and need to be resolved. The parties must also state whether they believe a hearing is necessary in this case, or whether the case could be submitted on the stipulated facts, prefiled testimony and evidence, and the prehearing briefs. If River Valley Construction wishes to become a party to this case, it must file written notice with the Board no later than March 11, 2004, and must join in the stipulation of the parties.

2. If the parties are unable to stipulate to all the facts of this case, prefiled testimony and exhibits must be filed only with respect to the facts that remain in dispute and need to be resolved in this proceeding.

3. If needed pursuant to paragraph two, on or before March 25, 2004, the Consumer Advocate and any intervenors must file prepared direct testimony and exhibits and a prehearing brief. The prepared direct testimony may refer to any document already in the record, and parties do not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In prepared testimony and exhibits, the Consumer Advocate and any intervenors must address the issues discussed above, and file any other evidence not previously filed. In its prepared testimony and exhibits, the Consumer Advocate must include any evidence it has to support its allegations that the verification recording was altered and that Long Distance Savings may be an affiliate of Small Business America. The

Consumer Advocate should use exhibit numbers one and following. In its prehearing brief, the Consumer Advocate must state what actions it believes would be necessary to bring this matter to a proper resolution, and why such actions would be appropriate and in accordance with applicable law.

4. If needed pursuant to paragraph two, on or before April 8, 2004, Long Distance Savings must file prepared testimony and exhibits and a prehearing brief. Long Distance Savings may refer to any document in the record, and does not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In its prepared testimony and exhibits, Long Distance Savings must address the issues discussed above and file any other evidence not previously filed. In its prepared testimony and exhibits, Long Distance Savings must provide a written transcript of the verification recording previously provided to the Board. In its prepared testimony, Long Distance Savings must state whether any recording of the October 7, 2003, conversation between the sales associate and Ms. Meyer exists and provide it if it does, unless this information was provided in the stipulation of facts. In the Board staff letter dated December 2, 2003, staff requested Long Distance Savings to provide proof that a written notice of service change was provided to the customer within 30 days, pursuant to 199 IAC 22.23(2). Long Distance Savings must provide such proof with its prefiled testimony. In addition, Long Distance Savings must provide specific information regarding the steps it takes to ensure its marketers properly represent products and services and do not misrepresent themselves, the identity of the marketer involved in the conversation

with Ms. Meyer, and the testimony of the marketer regarding the conversation. In its prefiled testimony, Long Distance Savings must state whether it requires its marketers to follow a script, and must provide a copy of the script if one is required. Long Distance Savings should use exhibit numbers 100 and following. In its prehearing brief, Long Distance Savings must cite to any statute, rule, or other law that would allow the undersigned administrative law judge to award it attorney fees and costs in this proceeding. In its brief, Long Distance Savings must also state what actions it believes would be necessary to bring this matter to a proper resolution, and why such actions would be appropriate and in accordance with applicable law.

5. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits, it must do so by April 15, 2004.

6. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa, on Tuesday, April 27, 2004, commencing at 10 a.m. Each party must provide a copy of its prepared testimony and exhibits to the court reporter. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Utilities Board at 1-515-281-5256 no later than Thursday, April 22, 2004, to request that appropriate arrangements be made.

7. In the absence of objection, all data requests and responses referred to in oral testimony or on cross-examination will become part of the evidentiary record of these proceedings. Pursuant to 199 IAC 7.2(6), the party making reference to the

data request must file one original and three copies of the data request and response with the Executive Secretary of the Board at the earliest possible time.

8. Any person not currently a party who wishes to intervene in this case must meet the requirements for intervention in 199 IAC 7.2(7). The person must file a petition to intervene on or before 20 days following the date of issuance of this order, unless the petitioner has good cause for the late intervention. 199 IAC 7.2(8).

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 19th day of February, 2004.